No. 18256

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVA RAMIREZ,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

The Appellee accepts and adopts the Statement of the Case of the Appellant except Paragraph two thereof. In that regard, the Appellant's Statement is the conclusion which Appellant seeks to have the Court establish by this appeal.

It would more accurately reflect the record to say that the Indictment in Counts IV and V did not contain the *words* "with intent to injure and defraud the bank".

The Trial Court's instruction to the jury on the elements necessary to be proved, as well as the other applicable law, are contained in the Supplemental Transcript of Record (STR 1).

OPPOSITION TO SPECIFICATION OF ERROR

The Trial Court was correct in denying Appellant's Motions to Dismiss, for Judgment of Acquittal, in Arrest of

Judgment, for New Trial, for the reason that Counts IV and V of the Indictment sufficiently charged the offense and the omission therefrom of the statement "with intent to injure and defraud" is not a fatal defect.

QUESTION PRESENTED

Appellant accepts and adopts Appellant's Question Presented.

SUMMARY OF ARGUMENT

1. Appellee asserts that the Indictment phrased in the terminology of the appropriate section of the code, detailing the facts charged as a violation of said section, and utilizing therein the terms "wilfully misapply" sufficiently charges the violation of 18 U.S.C. 656.

2. That although an admittedly essential element of the offense charged was not *specifically* set forth in the Indictment, defendant/appellant was not thereby prejudiced.

ARGUMENT

1. THE INDICTMENT SUFFICIENTLY CHARGES VIOLATION OF MISAPPLICATION

As to point one, the sole question is whether or not the specific words "intent to injure and defraud" must be contained in the Indictment to sufficiently charge the crime of misapplication of funds. It should be made clear that there is no disagreement that *proof* of such an intent is necessary. It is, and has recently been so held in this Circuit. *Benchwick vs. U.S.* (CA 9th 1961) 297 F. 2d. 330. The Trial Court, having recognized this requirement, properly and clearly instructed the jury as to the necessity of such intent. (STR 41-44).

Further, there is no question that the essential *facts* must be set out in an Indictment to properly charge an offense as provided in Federal Rules of Criminal Procedure, Rule 7(c).

It is submitted, however, that the Indictment herein *does* sufficiently set out the essential facts of the charge. The substantive acts charged are set out in great detail. The terms "wilfully misapply" used in conjunction with those detailed acts could have no other reasonable interpretation but to charge a criminal intent to defraud. This was the conclusion of the Courts in the 6th Circuit, *U. S. vs. Logsdon,* (D.C.W.D. Ky. 1955) 132 F. Supp. 3; aff'd. *Logsdon v. U. S.* (CA 6th 1958), 253 F. 2d. 12.

It should be noted that the basic problem of the Court in *U. S. vs. Cawthon,* (D.C.M.D.Ga. 1954), 125 Supp. 419, relied on by Appellant, appeared to be that the allegation of misapplication was merely as to an overdraft and as the Court said the "mere drawing and cashing of an overdraft, without more, is not a criminal offense under this section." The facts set forth must go beyond this and show how the misapplication took place and that it was unlawful. It is submitted that the Indictment herein met that requirement.

It should be noted, further, that, contrary to the statement in Appellant's Brief (App. Brief pg. 7), the Circuit Court in the *Logsdon,* supra, case clearly recognized the necessity of proving intent and the impact of the *Morissette* case (*Morissette v. U. S.,* 342 U. S. 246) in the following language:

> ". . . Since the ruling involved only the wording of the indictment, it in *no way impairs the necessity of proof by the Government of criminal intent* on the part of the appellant." 253 F. 2d at page 14. (emphasis added).

It remains then, in this regard, for this Court to determine whether " "Willful misapplication" of moneys . . . presupposes fraudulent intent . . ." (Judge Hand in *U. S. v. Matot,* 46 F. 2d. 197), sufficient to charge a violation when surrounding facts clearly set forth the method of such violation.

2. THAT ALTHOUGH AN ADMITTEDLY ESSENTIAL ELEMENT OF THE OFFENSE CHARGED WAS NOT *SPECIFICALLY* SET FORTH IN THE INDICTMENT THE DEFENDANT/APPELLANT WAS NOT THEREBY PREJUDICED.

As a first indication that defendant was not at any time in the least prejudiced by the absence of the phrase "*an intent to injure and defraud* it should be noted that defendant's counsel was aware during the prosecution case of the necessity of establishing such intent as an element of the crime charged. The Motion to Dismiss, based on the absence of that phrase, was made during the initial stages of the case for the United States. (TR. 15-16) That Motion and the renewal thereof, the denials of which give rise to this appeal, pointedly demonstrate Appellant's awareness of the requirement of proof of such element.

Further, and perhaps of greater importance, the instructions of the Court to the jury amply protected the Appellant's rights. This Court has recently held that the absence of a specific allegation of criminal intent is not reversible where sufficiently covered by the Trial Court's instructions. *Souza vs. U. S.* (CA 9th 1962), 304 F. 2d. 274.

Herein, not only did the Court instruct the jury, as quoted by the Appellant, that intent to injure or defraud was an essential element of the crime charged (STR 41) but went on to further instruct the jury and define thereby that requisite as follows:

> "In every crime there must exist a union or joint operation of act and intent. The burden is upon the prosecution to prove both act and intent beyond a reasonable doubt. In the case of certain crimes it is necessary that, in addition to the intended act which characterizes the offense the act must be accompanied by a specific or particular intent without which the crime may not be committed

Thus, in the offense charged in this case, the offense of wilfully misapplying moneys, funds or credits of a bank, a necessary element is the existence in the mind of the perpetrator of the *specific intent to injure or defraud the bank, and unless such intent so exist, the offense is not committed.*

"I instruct you on this matter of intent that as to both counts four and five of the indictment that if, from all of the evidence in the case you should believe beyond a reasonable doubt that the acts charged against the defendant in such counts were committed by her at the time and in the manner charged in the indictment, and that the natural and necessary result of such acts was to injure or defraud the Valley National Bank of Arizona, and that the defendant committed such acts voluntarily and intentionally and with full knowledge that the natural and necessary result thereof would be to injure or defraud the bank, then you may infer as to such acts that they were committed with the intent to injure or defraud mentioned in the Statute." (STR 43-44) (emphasis added).

It is submitted, therefore, that because of defendant/ppellant's awareness of the requirement of proof of intent nd the Court's clear instruction thereon, Appellant's rights vere fully protected.

CONCLUSION

It is respectfully submitted that Counts IV and V of ie Indictment do aver facts sufficient to constitute an offense nd do charge Appellant with a crime; that Appellant was in o way prejudiced by the omission of the words "intent to njure and defraud the bank" since the Trial Court instructed ie jury as to the specific criminal intent and that this intent as an essential element of the crime; and since the Appellant as initially aware of this element and requirement of proof.

For all of the foregoing reasons, it is respectfully submitted that the rulings of the Trial Court herein appealed should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing Brief is in full compliance with those rules.

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